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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ELIZABETH TERRY,

Plaintiff,

-against-

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE,

Defendant.

---X

15-CV-09660 (RA)(SN)

REPORT AND RECOMMENDATION

SARAH NETBURN, United States Magistrate Judge.

TO THE HONORABLE RONNIE ABRAMS:

Elizabeth Terry, pro se, brought this action against defendant Corporation for National and Community Service ("CNCS" or the "Corporation"), alleging, among other claims, unpaid wages, withholding of unemployment insurance, negligence related to a cyberattack, wrongful termination, and improper use of intellectual property.

The CNCS has moved for judgment on the pleadings on each of Terry's claims pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The CNCS asserts the following arguments: (1) Terry has not identified any waiver of sovereign immunity, and the Court therefore lacks subject matter jurisdiction, over her claims for unpaid wages, lack of unemployment insurance, overwork, and wrongful termination; (2) the Court lacks jurisdiction over any negligence claims because Terry has failed to exhaust administrative remedies; and (3) all of her allegations fail to state a claim. For the reasons set forth below, the Court recommends that the defendant's motion be GRANTED in its entirety.

BACKGROUND

The following facts alleged by Terry in her pleadings and the documents attached thereto are assumed to be true for purposes of this report and recommendation. In re Sept. 11 Litig., 751 F.3d 86, 90 (2d Cir. 2014) (citing Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999)).

I. Factual Background

The CNCS is the federal agency that administers the Volunteers in Service to America ("VISTA") program, pursuant to the Domestic Volunteer Service Act of 1973 ("DVSA"). Members of the VISTA program are not federal employees, subject to enumerated exceptions including the Hatch Act, the Federal Tort Claims Act, and the Federal Employees' Compensation Act. See 42 U.S.C. § 5055(a)–(e).

Members are matched with public or nonprofit entities, which act as their sponsors and day-to-day supervisors for a one-year term. The division of responsibilities between the CNCS and the sponsoring organization is clear: "Though the VISTAs are screened, trained and supported throughout their service by the VISTA program and the Corporation for National and Community Service, VISTAs serve under the direct supervision of the sponsoring agency." See Plaintiff's Nov. 2, 2016 Opposition ("Pl. Opp."), Ex. B. The sponsor is responsible for overseeing the member's VISTA Assignment Description ("VAD"). See Pl. Opp., Ex. D at 11. The VAD "outlines [the member's] position and what they will achieve," as well as the responsibilities of the sponsoring organization. Id.

Terry served as a VISTA member from August 30, 2014, to February 24, 2015. She was placed with World Cares Center ("WCC"), a non-profit organization in New York. The VISTA Handbook states that WCC project managers perform the following supervisory duties: (1) conducting regular meetings with the VISTA volunteer to "review program plans and how

VISTAs will accomplish their overall VAD goals by successfully completing the tasks associated with VAD"; (2) reviewing the volunteer's program plans in detail; and (3) ensuring that the program plan accommodates the "VISTA's capabilities and schedule" to "prevent VISTAs from becoming overwhelmed and allowing the VISTAs to fulfill their work goals." Id.

VISTA members are given a modest living allowance, as well as travel stipends and other service-related benefits. For Terry, a full year of service would have generated an annual allowance of $15,312. See Pl. Opp., Ex. B. She was paid a biweekly installment of $587.30. The Handbook notes that "WCC will pay for service-related public transportation expenses when activities in VAD require servicing the community outside of the office." Pl. Opp., Ex. D at 15. All service-related travel is "confirmed at the time of orientation and in keeping with the previously agreed upon job description and VAD." Id. Upon completing their service, members receive either a $1,500 cash stipend or a Segal AmeriCorps Education Award.

On January 26, 2015, Terry was placed on administrative hold and officially terminated on February 24, 2015, after she was unable to locate another VISTA assignment. Terry continued to accrue an allowance during the one month in which she was on administrative hold—her last pay period ended on March 7, 2015. See Declaration of Jessica Vasquez ("Vasquez Decl."), Ex. A at 15 (ECF No. 42-1). She received a pro-rated end-of-service stipend of $739.80 with her last allowance installment. See id. The total allowance paid to her was $7,551.

II. Procedural Background

Terry filed a pro se action in New York State Supreme Court, New York County, against the CNCS on October 27, 2015, which was then removed to this Court. On January 11, 2016, she was ordered to file an amended complaint. She submitted an initial letter raising her claims against the CNCS on May 10, 2016. See Plaintiff's First Amended Complaint ("FAC") at 1 (ECF No. 19). She then filed a second amended letter, which is to be construed as the operative complaint, on June 17, 2016. See Plaintiff's Second Amended Complaint ("SAC") (ECF No. 21). The Court has since denied additional attempts by Terry to amend her complaint. See ECF No. 31, 51.

Terry alleges the following claims in her June 2016 amended complaint: (1) she was not paid the full amount of her allowance during the period from August 24, 2014, to March 7, 2015; (2) she was wrongfully terminated from her VISTA assignment; (3) she was denied unemployment insurance after termination from the VISTA program; (4) the certificate of completion she received for a training course did not contain the name of the private institution that offered the course, and she was therefore denied the education she expected in connection with her VISTA membership; (5) she was given an unreasonable work load while at WCC; and (6) the CNCS was negligent in connection with a cyberattack against the Office of Personnel Management ("OPM"). In her November 2, 2016 Opposition to the defendant's motion for judgment on the pleadings, Terry raised three new claims: (1) her intellectual property was illegally used; (2) her Supplemental Nutrition Assistance Program ("SNAP") benefits were taken away during her term of service; and (3) her personal property was lost and her intellectual property was used without authorization.

DISCUSSION

I. Legal Standard for Motion for Judgment on the Pleadings

Judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) "is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings." Sellers v. M.C. Floor Crafters Inc., 842

F.2d 639, 642 (2d Cir. 1988). When reviewing a party's Rule 12(c) motion, the "Court must view the pleadings in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party." Davidson v. Flynn, 32 F.3d 27, 29 (2d Cir. 1994) (citing Madonna v. United States, 878 F.2d 62, 65 (2d Cir. 1989)) (internal quotations omitted).

In considering a Rule 12(c) motion for judgment on the pleadings, the court applies the same standards used for the determination of a Rule 12(b) motion to dismiss. See LaFaro v. N.Y. Cardiothoracic Grp., PLLC, 570 F.3d 471, 475–76 (2d Cir. 2009). The Court's function is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985) (citation omitted). The Court should not dismiss the complaint if the plaintiff has provided "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). While the Court should construe the factual allegations in the light most favorable to the plaintiff, "the tenet that [the Court] must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Id.

In addition, the Court may consider any written documents that are attached to a complaint, incorporated by reference, or are "integral" to it. Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004). This includes documents that the plaintiff relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of when bringing suit, or matters of which judicial notice may be taken. See Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 776 (2d Cir. 2002); Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). "Even where a document is not incorporated by reference, the [C]ourt may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." Chambers, 282 F.3d at 154 (quoting Internat'l Audiotext Network Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995)) (internal quotations and citations omitted).

When the plaintiff is proceeding pro se, the Court must "construe [the] complaint liberally and interpret it to raise the strongest arguments that [it] suggest[s]," Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) (citation and internal quotation marks omitted). "Even in a pro se case, however . . . threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 170 (citation and quotation marks omitted). Additionally, the "failure to oppose a 12(b)(6) motion cannot itself justify dismissal of a complaint." Haas v. Commerce Bank, 497 F. Supp. 2d 563, 564 (S.D.N.Y. 2007) (citing McCall v. Pataki, 232 F.3d 321, 322 (2d Cir. 2000)).

II. Subject Matter Jurisdiction

A. CNCS Has Not Waived Sovereign Immunity For Terry's Claims Related To VISTA Membership

To the extent that Terry's allegations of wrongful termination, lack of unemployment insurance, overwork, and unpaid wages (among other allegations) are to be construed as employment and breach of contract claims against the CNCS, such claims must be dismissed for lack of subject matter jurisdiction. A suit against a federal agency in its official capacity is "essentially a suit against the United States." Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994). "Absent an unequivocally expressed statutory waiver, the United States, its agencies, and its employees (when functioning in their official capacities) are immune from suit based on the principle of sovereign immunity." Cnty. of Suffolk v. Sebelius, 605 F.3d 135, 140 (2d Cir. 2010) (internal citation omitted). Where the United States is immune from suit, a court lacks jurisdiction. See U.S. v. Mitchell, 445 U.S. 535, 539 (1980).

The United States has waived sovereign immunity under certain statutes for federal employees. For instance, the Civil Service Reform Act of 1978 ("CSRA") allows specific categories of federal employees to seek judicial review of agency decisions (see United States v. Fausto, 484 U.S. 439, 446 (1988)), while the Fair Labor Standards Act of 1974 ("FLSA") was amended to cover federal employees (see El-Sheikh v. United States, 177 F.3d 1321, 1323–24 (Fed Cir. 1999)). But none of Terry's claims can be asserted under the CSRA or the FLSA. Terry, as a VISTA volunteer, "shall not be deemed [a] Federal employee[] and shall not be subject to the provision of laws relating to Federal officers and employees and Federal employment." 42 U.S.C. § 5055(a). Those "laws" include laws "relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits . . . ." H.R. Rep. No. 88-1458 (1964), reprinted in 1964 U.S.C.C.A.N. 2900, 2959. Terry's biweekly allowance statements confirm the same: "These payments are not wages under federal or state unemployment compensation laws (45 USC 5055)." Vasquez Decl., Ex. A (ECF No. 42-1). Therefore, because Terry was not a federal employee, the Court cannot exercise jurisdiction over her claims by any statutory waiver of sovereign immunity for suits by federal employees. Moreover, although the DVSA (under which the defendant administers the VISTA program) contains procedures for addressing work-related grievances raised by a VISTA volunteer, the statute does not waive sovereign immunity or provide for judicial review.

Additionally, to the extent that Terry's claims for wrongful termination, overwork, lack of employment insurance, and unpaid wages are construed as breach of contract claims, such claims are governed by the Contract Disputes Act of 1978 ("CDA"), which must be brought before the United States Court of Federal Claims. See Champagne v. United States, 15 F. Supp. 3d 210, 219 (N.D.N.Y. 2014). Therefore, any contract-based claims, to the extent Terry's claims can be stylized as such, cannot be raised before this Court.

Accordingly, the Court lacks jurisdiction over Terry's claims for unpaid wages, overwork, wrongful termination, and lack of unemployment insurance.

B. The FTCA's Limited Waiver is Unavailable

Terry asserts a negligence claim against the CNCS in connection with the cyber-intrusion into records maintained by the OPM, which included her Social Security number and fingerprints. The CNCS had provided that information to OPM as part of a routine background check before Terry joined the VISTA program. Such negligence claims would ordinarily be brought under the Federal Tort Claims Act ("FTCA").

In enacting the FTCA, Congress waived the United States' sovereign immunity with respect to claims seeking money damages for personal injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his or her employment." 28 U.S.C. § 1346(b)(1). The FTCA therefore "constitutes a limited waiver by the United States of its sovereign immunity and allows for a tort suit against the United States under specific circumstances." Hamm v. United States, 483 F.3d 135, 137 (2d Cir. 2007) (quotation marks omitted).

The Court lacks jurisdiction over Terry's negligence claim for two reasons. First, Terry has named the wrong defendant in bringing a tort suit against the CNCS under the FTCA. The FTCA prohibits a government agency from being sued in its own name. See 28 U.S.C. § 2679(a). Therefore, any tort claim against the CNCS, an agency of the federal government, "can only be maintained against the United States." Newton v. Bureau of Prisons, No. 10 Civ.

5046 (DLI), 2011 WL 1636259, at *2 (E.D.N.Y. Apr. 28, 2011); see also C.P. Chem. Co. v. United States, 810 F.2d 34, 37 n.1 (2d Cir. 1987) ("The FTCA expressly provides that only the United States may be held liable for torts committed by a federal agency, and not the agency itself."); Rivera v. United States, 928 F.2d 592, 609 (2d Cir. 1991) ("The only proper federal institutional defendant in [an FTCA] action is the United States").

While this defect could be cured by amendment, the Court should not grant leave to amend because Terry's claim would be futile. Terry has not exhausted the FTCA's administrative requirements for bringing a tort suit against the Corporation, which is a jurisdictional requirement that cannot be waived. Celestine v. Mt. Vernon Neighborhood Health Ctr., 403 F.3d 76, 82 (2d Cir. 2005). An injured party wishing to sue under the FTCA must first file a claim with the federal agency responsible for the alleged misconduct. See 28 U.S.C. § 2675(a) (requiring that the claimant "shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied"). "The burden is on the plaintiff to both plead and prove compliance with the statutory requirements." In re Agent Orange Prod. Liab. Litig., 818 F.2d 210, 214 (2d Cir. 1987). Terry has not alleged that she administratively raised her negligence claim.[1] Thus, even if Terry had properly named the United States as a defendant, she has failed to plead exhaustion and cannot cure that defect.

III. Terry Fails to State a Claim Under Any Legal Theory

The Court should dismiss this action for lack of subject matter jurisdiction. But, even if the Court could consider Terry's claims, her allegations fail to state a claim entitling her to relief.

A. Unpaid Wages

[1] And the Government has provided the Declaration of Thomas L. Bryant, establishing that, as a factual matter, she has not exhausted her administrative remedies. See ECF No. 43.

In her amended letter, Terry claims she was underpaid by approximately $102 per month from August 24, 2014, to March 7, 2015. The Corporation seeks judgment on the pleadings on the ground that Terry was paid exactly the amount she was owed. Terry's annual allowance was $15,312. She was paid on a bi-weekly basis in the amount of $587.30. The $102 monthly "underpayment" that Terry alleges, appears to be the difference between $1,276.00, which is the monthly breakdown of her annual allowance ($15,312 divided by 12), and $1,174.60, which is twice the biweekly allowance of $587.30 that she actually received.

Terry's own documents reflect that she received an allowance of $587.30 on a biweekly basis (every 14 days). Therefore, her daily allowance was $41.95. Assuming that she completed a full year of membership, her yearly allowance would be $15,312 ($41.95 multiplied by 365 days, rounded up), as promised in the Corporation's August 1, 2014 letter. Terry instead divided the yearly allowance amount by 12 months, yielding the number that she alleges she should have been paid. Her calculation, however, assumes that she was paid in 12 equal (monthly) installments, when she was actually paid every 14 days. Accordingly, Terry is not owed any additional money with regards to her allowance.

Terry also alleges in her Opposition that she was owed an additional $120 per month for "transportation money for field work." Pursuant to the Handbook, all service-related public transportation costs incurred where "activities in VAD require servicing the community outside of the office" are covered by WCC. Pl. Opp., Ex. D at 15. Therefore, to the extent Terry is owed money, it is due from WCC, and not the defendant. Terry, moreover, has provided no additional information to support her allegation against the Corporation.

B. Wrongful Termination

Terry claims she was wrongfully terminated by the Corporation. According to her termination letter, she was placed on administrative hold on January 26, 2015, and officially terminated on February 25, 2015, due to a "lack of suitable assignment," pursuant to 45 C.F.R. § 1210.3–2(d). Pl. Opp., Ex. N. The letter informed her that she would be given consideration for reinstatement if an appropriate assignment became available for the year after her termination. In addition, because her termination was due to lack of a suitable assignment, her record would not contain any "negative reflection." FAC at 8 (ECF No. 19); see also Pl. Opp., Ex. N.

Under the version of 45 C.F.R. § 1210.3 in effect at the time of Terry's removal, the sponsoring agency, not the CNCS, makes the initial decision to terminate a volunteer. See 45 C.F.R. § 1210.3–2(a)(2) ("The sole responsibility for terminating or transferring a Volunteer rests with the ACTION agency."). Once the decision to terminate is made, if no resolution can be reached with the sponsoring organization within 15 days, the volunteer will first be placed on administrative hold. See 45 C.F.R. § 1210.3–2(b). A volunteer will then be permanently removed, under 45 C.F.R. § 1210.3–2(d) (the cited provision in Terry's termination letter), as a result of either the "termination of, or refusal to renew, the Memorandum of Agreement between ACTION and the sponsoring organization, or the termination or completion of the initial Volunteer agreement." 45 C.F.R. § 1210.3–2(d). Terry's SAC does not allege that the Corporation failed to comply with these procedures in terminating her service or that there was no valid ground for removal and termination.

As a corollary to her wrongful termination claim, Terry raises a new claim in her Opposition that, in violation of New York state employment laws, the Corporation terminated her in retaliation for filing a grievance with WCC. First, a party is not allowed to raise new claims in an opposition brief. See Fed. R. Civ. P. 8(a); see also Hodges v. Attorney Gen., 976 F. Supp. 2d 480, 496 (S.D.N.Y. 2013) (raising a new claim in an opposition brief more than one year after the complaint was filed was "not the proper procedure for amending a pleading to add a new claim"); Fraser v. Fiduciary Trust Co. Internat'l, No. 04 Civ. 6958 (PAC), 2009 WL 2601389, at *10 n.8 (S.D.N.Y. Aug. 25, 2009) (the plaintiff "in effect is apparently attempting to add [a] claim never addressed, or even hinted at, in the complaint. Such a step is inappropriate at the summary judgment stage, after the close of discovery, without the Court's leave, and in a brief in opposition to a dispositive motion") (internal citation and quotation marks omitted). Terry's new claim of retaliation is not properly plead.

But even if this retaliation claim can be considered, it fails on the merits. Terry asserts that in violation of state employment laws, the Corporation retaliated against her after she filed a grievance with WCC. See Pl. Opp. at 2. To the extent such a retaliation claim is viable, it must be brought against WCC. Terry fails to allege that the Corporation terminated her VISTA membership for any reason other than her failure to find a suitable reassignment. Her termination was in accordance with the regulations in effect at the time, and Terry makes no allegations to the contrary.

C. Lack of Unemployment Insurance

As a VISTA volunteer, Terry was not entitled to any unemployment insurance. Volunteers are "not regarded as federal employees for purposes of unemployment compensation" and the sponsoring organization is "not authorized to make contributions to any state unemployment compensation fund on behalf of AmeriCorps VISTA members assigned to the organization." Chapter 14: Basic Laws & Federal Regulations, VISTA Campus, https://www.vistacampus.gov/chapter-14-basic-laws-federal-regulations-0. Furthermore, volunteers are "not covered by federal or state unemployment compensation for their periods of AmeriCorps VISTA service. AmeriCorps VISTA members elect a stipend or an Education Award in lieu of unemployment compensation." Id. Terry's allegation that she was wrongfully denied unemployment insurance is undermined by the fact that her biweekly allowance statements state unambiguously, "NOTICE – NO UNEMPLOYMENT INSURANCE COVERAGE PROVIDED." Vasquez Decl., Ex. A (ECF No. 42-1). Accordingly, Terry had no contractual or statutory right to unemployment insurance. The Court should grant defendant judgment on any such claim.

D. Denial of Public Assistance Benefits

Terry alleges that she is a "victim of fraud" because her SNAP benefits were wrongfully terminated "despite federal laws which were designed to protect my benefits during my term of service." Pl. Opp. at 1. Terry sought redress for the discontinuation of her benefits before the New York State Division of Human Rights and the New York State Office of Temporary and Disability Assistance ("OTDA"). Under 42 U.S.C. § 5044, income received by a VISTA volunteer, including subsistence allowances, "shall not in any way reduce or eliminate the level of, or eligibility for, public assistance or services (TANF, Medicaid, child care subsidy, SSI) that they may be receiving or are eligible to receive under any governmental program." 42 U.S.C § 5044(f)(1). This provision is "designed to ensure that persons, and families of persons, receiving assistance or services under any federal, state, or local governmental program before entering AmeriCorps*VISTA service do not lose those benefits, or have those benefits reduced, *as a result of their service*." Pl. Opp., Ex. C (emphasis added).

Here, as with her wrongful termination and retaliation claims, Terry ignores the Corporation's narrow administrative role—the Corporation would not have been involved in any decision to suspend her public assistance benefits. Terry herself concedes in a January 22, 2015 email to a representative of the Corporation that the decision to deny public assistance benefits was made by a New York City agency. Pl. Opp., Ex. H; see also id., Ex. I ("I feel that The HRA [Human Resources Administration] passed me up for SNAP because I was utilizing a non-B2W employment agency."). In addition, in an April 19, 2016, decision rendered after a Fair Hearing, the OTDA determined that the living stipend Terry received for her participation in the program "does not, as a matter of right[,] mandate eligibility for benefits." Pl. Opp., Ex. K at 3. The agency concluded that Terry "did not present at the [Fair Hearing] any compelling evidence to support a conclusion that the Appellant's non-receipt of benefits was due to the AmeriCorps stipend." Id. Therefore, Terry has failed to plead facts that would bring the denial of her SNAP benefits within the scope of 42 U.S.C. § 5044—in other words, she has failed to allege that CNCS caused the Human Resources Administration to deny her public assistance benefits.

E. Denial of Educational Opportunity

Terry also alleges that she was not given the education from VISTA that she expected because the certificate of completion for the VISTA Blend training course did not display "Bank Street College of Education." The VISTA Blend training course is an educational opportunity offered exclusively to VISTA members. See Pl. Opp., Ex. U at 2 (noting that "at this time, the course is only for VISTAs."). The course was "designed specifically for the unique circumstances, opportunities, and challenges faced by VISTAs," and intended to bolster a volunteer's "motivation, service satisfaction, and morale." Id. at 1–2. In exchange for completing the course, the volunteer would earn transferable college credit recommendations. In providing the course to its volunteers, VISTA partnered with the Bank Street College of Education, which "bring[s] more than 16 years of experience designing and delivering training to VISTA members and supervisors." Id. Therefore, the Bank Street College of Education was a co-sponsor of the training program. In addition, the certificate of completion was signed by both the VISTA Blend Coordinator and the VISTA Director of Training. Accordingly, the Corporation's recommendation that Terry "take up her grievance with that institution" and obtain a refund misunderstands the central role of the Bank Street College of Education and the fact that the course was offered free of charge to VISTA members. Defendant's Memorandum of Law at 13 (ECF No. 41); see also Pl. Opp., Ex. U at 2.

That said, Terry's allegation does not center on the quality of the training course but instead on the lack of any mention of the Bank Street College of Education on the certificate of completion. Terry has not alleged any contractual obligation on the Corporation's part to place the name of the partnering educational institution on certificates of completion for its training courses. Nor does she allege that she failed to receive the type of education that she expected, i.e., she was not given credit for completing the training course, VISTA withheld the course materials, or her sponsoring organization refused to allow her to attend the training course. Any allegation regarding the education she received in connection with her VISTA membership fails to state a claim.

F. Overwork at WCC

Terry claims that she was given an unreasonable work load after WCC failed to find replacements for two other VISTA volunteers who had quit. On January 25, 2015 (shortly before she was placed on administrative hold), the plaintiff complained to the WCC Operations Manager that, at the time, she was doing the work of "2.5 or 3 other VISTA volunteers in addition to completing my own daily work load." Pl. Opp., Ex. M.

But Terry fails to state a claim regarding her workload as against the Corporation. She does not allege that she had any agreement or contract with the CNCS specifying a required number of hours per week. On the contrary, her work schedule was controlled entirely by WCC. In response to an inquiry from the Federation Employment and Guidance Service[2] in October 2014, the Corporation stated, "Should you require more information regarding [Terry's] work performance, including the number of hours worked per week, you will have to contact the sponsoring agency, World Cares Center, for that specific information." Pl. Opp., Ex. L at 1; see also id., Ex. Q ("Should you wish to contact the sponsor for details of the VISTA's job description and performance, the Corporation will be happy to forward the sponsor's contact information."). Moreover, she was given notice that VISTA volunteers at WCC did not have a strict work schedule. The Handbook reminds volunteers that "[m]embers remain available for service, *without regard to regular working hours*, at all times during the member's service except for periods of approved leave in writing," such that other employment during the tenure of service is not allowed. Pl. Opp., Ex. D at 13 (emphasis added). In terms of "WCC Flex Time and Scheduling," the WCC team generally "works an average of 40-50 hours a week," and "[e]veryone is asked to remain flexible as the expectation may be more than the typical 40 hours per week." Id. Therefore, the defendant's motion for judgment on the pleadings should be granted with respect to Terry's workload claim.

G. Improper Use of Intellectual and Real Property

Terry alleges that a WCC hiring manager had shared her writing samples, which she had provided as part of her VISTA volunteer application, without permission. See Pl. Opp., Ex. G.

[2] The Federation Employment and Guidance Service ("FEGS") is a now defunct nonprofit health and human services organization.

The defendant moves for judgment on the pleadings on the basis that Terry's allegations fail to state a claim as against the Corporation.

Because the alleged misconduct was committed by a WCC employee, the claim is wrongly directed against the Corporation. In fact, Terry was told specifically that "CNCS does not request writing samples and is not the appropriate source to address the use of your writing samples." Id. Terry has also failed to state a cognizable claim against the Corporation for the alleged loss of her personal belongings. The relevant email correspondence shows that after she was terminated from the VISTA program, she asked the WCC hiring manager to return her personal property. She received a prompt response that her belongings would be mailed to her address, or that, alternatively, she could retrieve the belongings in person. As with her claim regarding her writing sample, decisions (if any) regarding Terry's property were made by the sponsoring agency (WCC), not the Corporation. Therefore, any claims regarding intellectual or personal property are more properly directed to the sponsoring agency, not to the administering agency.

H. Negligence

Finally, Terry's negligence claim fails because she has not alleged any injury caused by any alleged negligence of CNCS in connection with the cyber intrusion experienced by OPM. Shortly after the cyber intrusion, the OPM informed her that although it was "not aware of any misuse of [her] information," it would still offer "credit monitoring, identity monitoring, identity theft insurance and identity restoration services" for the next three years. FAC at 2 (ECF No. 19). She has not shown that she has needed to use the OPM's offer of free credit services or any concrete, particularized injury at all as a result of the security breach. See Shafran v. Harley-Davidson, Inc., No. 07 Civ. 1365 (GBD), 2008 WL 763177, at *2 (S.D.N.Y. Mar. 20, 2008)

("[A]n increased risk of future identity theft is not, in itself, an injury that the law is prepared to remedy"). Moreover, Terry has failed to allege that the Corporation was negligent in providing Terry's personal information to OPM for purposes of a routine background check. For these reasons, any negligence claim fails on the merits.

CONCLUSION

Construing the facts in the light most favorable to Terry, there are no material facts in dispute that would render judgment on the pleadings in the defendant's favor improper. Accordingly, the Court recommends that the defendant's motion for judgment on the pleadings under Rule 12(c) be GRANTED in its entirety.

SARAH NETBURN
United States Magistrate Judge

DATED: March 21, 2017
New York, New York

* * *

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen days from the service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. See also Fed. R. Civ. P. 6(a), (d) (adding three additional days only when service is made under Fed. R. Civ. P. 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to by the parties)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Ronnie Abrams at the Thurgood Marshall United States Courthouse, 40 Foley

Square, New York, New York 10007, and to any opposing parties. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Abrams. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); Thomas v. Arn, 474 U.S. 140 (1985).

cc: Elizabeth Terry (*by Chambers*)
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